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In the Supreme Court of the United States

OCTOBER TERM, 1983

ST. JAMES HOSPITAL, PETITIONER

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner contends that the Secretary of Health and Human Services acted unlawfully in denying Medicare reimbursement for a portion of the cost of care of indigent patients that hospitals are required to provide without charge as a condition to receipt of federal construction subsidies under the Hill-Burton Act, 42 U.S.C. 291 *et seq.* In particular, petitioner challenges the constitutionality of Section 106 of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), Pub. L. No. 97-248, 96 Stat. 337, in which Congress made clear that the Secretary's interpretation of the Medicare statute to preclude reimbursement for the costs of Hill-Burton free care is correct. In addition,

petitioner challenges the sufficiency of the evidence underlying 42 C.F.R. 405.310,[1] a regulation providing that patient bedside telephones are nonreimbursable "personal comfort items," as that term is used in the Medicare statute, 42 U.S.C. 1395y(a)(6).

1. The court of appeals upheld the Secretary's denial of Medicare reimbursement for the cost of Hill-Burton free care, based on both construction of the Medicare statute and Section 106 of TEFRA. Pet. App. 9a-15a. A challenge to the court of appeals' holding on this issue is now before this Court in a related case, *Johnson County Memorial Hospital* v. *Heckler*, No. 82-1805. Petitioner's contentions are similar to those presented by the petitioners in *Johnson County*.[2] In our brief in opposition in *Johnson County*, we addressed the issue of Medicare reimbursement for Hill-Burton free care costs, pointing out that the court of appeals' holding is correct and is in accord with the decisions of five other courts of appeals and that the issue is not one of continuing importance. We refer the Court to that discussion, which establishes that review of this issue is not warranted.[3]

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[1]42 C.F.R. 405.310 states in pertinent part:

> [N]o payment may be made for any expenses incurred for the following items or services:
>
> * * * * *
>
> (j) Personal comfort items and services (for example a television set, or telephone service, etc.);
>
> * * * * *

[2]The court of appeals decided *Johnson County* and this case on the same day, and it relied on the decision below in concluding in *Johnson County* that the Secretary did not err in denying Medicare reimbursement for Hill-Burton free care costs. *Johnson County Memorial Hospital* v. *Schweiker*, 698 F.2d 1347, 1350-1351 (7th Cir. 1983).

[3]We are providing petitioner with a copy of our brief in opposition in *Johnson County*.

Petitioner places special emphasis on *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871), a case not mentioned in the court of appeals' opinion or in the *Johnson County* petition. See Pet. 11-15. In *Klein* Congress had enacted legislation in which it purported to bind the courts to disregard a Presidential pardon and to remove from the Supreme Court jurisdiction of certain appeals, the effect of which would have been to deprive Klein of a Court of Claims judgment in his favor for proceeds from sale of his property. The Court declined to enforce the legislation, concluding, *inter alia*, that it was an unconstitutional attempt to interfere with judicial power.

This case is very different from *Klein*. Section 106 of TEFRA does not deprive any court of jurisdiction or eliminate existing legal rights; instead, it merely ratifies the Secretary's established interpretation of the Medicare statute. See pages 6-10 of our Brief in Opposition in *Johnson County*. Accepting for the sake of argument the premise that Section 106 creates new law, it does not operate to deprive petitioner of any vested right to compensation that has already accrued. Like any statutory scheme, the Medicare program is subject to alteration over time. Moreover, as we point out in our Brief in Opposition in *Johnson County* (at 13), there is no plausible basis for the suggestion that Section 106 abrogated an expectation of reimbursement on which hospitals reasonably relied; thus, petitioner's attempt to analogize this case to *Klein* by portraying Section 106 as the repudiation of a debt, on which petitioner otherwise expected payment, simply distorts reality. In any event, *Klein* should not be read as casting doubt on the well-established principle (see pages 10-11 of our Brief in Opposition in *Johnson County*) that courts must apply changes in the law that take effect while a case is pending on appeal. See *American International Group, Inc.* v. *Islamic Republic of Iran*, 657 F.2d 430, 442 (D.C. Cir. 1981). See also *Dames & Moore* v. *Regan*, 453 U.S. 654, 684-685 (1981).

Petitioner further contends (Pet. 17-18) that the court of appeals' decision will require it to operate at a loss and that the result will be an unconstitutional taking of property. But petitioner voluntarily assumed the obligation to provide free care to indigents in exchange for valuable Hill-Burton subsidies. Moreover, if a hospital can demonstrate to the Secretary that it is financially unable to perform its obligations under the Hill-Burton Act, the Secretary may waive the requirement. 42 U.S.C. 291c(e). Thus, no hospital is required to operate at a loss by reason of its Hill-Burton obligation.

2. The court of appeals also correctly upheld the Secretary's conclusion that patient bedside telephones are "personal comfort items" that are barred from Medicare reimbursement under 42 U.S.C. 1395y(a)(6). Pet. App. 15a-19a.[4] The court held (*id.* at 18a):

> The Secretary's regulation banning the reimbursement of the cost of a telephone used for a Medicare patient's personal comfort is clearly authorized by 42 U.S.C. § 1395y(a)(6). Since the Secretary has the broad authority to adopt regulations within the confines of the stated congressional intent, and because St. James has failed to show that the Secretary abused his discretion in determining that bedside telephones are personal comfort items, we hold that the cost of providing a Medicare patient with a bedside telephone is not a reimbursable cost under the Medicare program.

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[4]The Provider Reimbursement Review Board declined to consider petitioner's claim for patient telephone costs, because petitioner had failed to include those costs in its 1977 Medicare cost report. See 42 U.S.C. 1395*oo*(a); Pet. App. 8b. See also 42 U.S.C. 1395*oo*(g) (precluding review of denial of reimbursement for items or services listed in 42 U.S.C. (& Supp. V) 1395y). However, the district court and the court of appeals concluded that they could consider the claim. See Pet. App. 16a-17a; 13b-14b.

This Court previously declined to review a constitutional challenge to the Secretary's denial of Medicare reimbursement for patient telephones in *Presbyterian Hospital* v. *Schweiker*, 454 U.S. 940 (1981). Since the *Presbyterian Hospital* decision, several courts have declined to interfere with the Secretary's denial of reimbursement for costs of patient telephones.[5]

Petitioner's contention (Pet. 22-24) that the Secretary's patient telephone regulation constitutes an irrebuttable conclusion of medical fact is insubstantial. The regulation, promulgated soon after passage of the Medicare statute, reflects a reasonable, common-sense distinction between telephones used primarily by patients to call friends and relatives and telephones used for intra-hospital communications and alert systems. The latter are indispensable to the treatment of illness, while personal telephones are not. We do not dispute the self-evident proposition, bolstered by petitioner's extensive "medical" evidence, that by improving patients' morale and helping them to maintain contact with the outside world, personal telephones may aid the

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[5]In *Memorial Hospital* v. *Heckler*, 706 F.2d 1130, 1133-1134 (11th Cir. 1983), the court agreed with the court below that the Secretary's patient telephone regulation is not arbitrary, capricious, or an abuse of discretion, and is consistent with the Medicare statute and regulations. In *Catholic Medical Center* v. *NH-VT Hospitalization Service, Inc.*, 546 F. Supp. 297 (D.N.H. 1982), aff'd on other grounds, 707 F.2d 7 (1st Cir. 1983), the court concluded that it lacked jurisdiction to review the intermediary's denial of reimbursement for patient telephone costs, citing 42 U.S.C. 1395*oo*(g). See also *St. Francis Hospital, Inc.* v. *Califano*, 479 F.Supp. 761 (D.D.C. 1979) (when separate nurse-signaling system is available, Medicare statute and regulations exclude reimbursement for patient telephones). Another case, in which the district court upheld a challenge to the Secretary's patient telephone regulation on the basis of the district court decision in this case, is pending on appeal. *Arlington Hospital* v. *Schweiker*, 547 F.Supp. 670, 677-679 (E.D. Va. 1982), appeal pending, Nos. 83-1439 and 83-1446 (4th Cir.).

healing process. But the same could be said of televisions or radios, a private room, typewriters for letters, and a variety of other services that undoubtedly would be as "therapeutic" for many patients as bedside telephones. Congress expressly authorized the Secretary to draw a line between personal comfort items, which are not reimbursable, and therapeutic services, which are reimbursable. See 42 U.S.C. 1395x(v)(1)(A), 1395y(a)(6) and 1395hh. The Secretary has acted well within this discretion in concluding that routine patient telephone service is not reimbursable. That conclusion is reasonable, and the court of appeals properly deferred to it. See, *e.g., Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450-451 (1978); *Batterton* v. *Francis*, 432 U.S. 416, 425 (1977).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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